



1/21/19

Dear Mr. Rose,

The undersigned organizations, Community Water Center, Environmental Law Foundation, and Environmental Justice Coalition for Water, submit these comments on the Agricultural Order 4.0 Conceptual Regulatory Requirement Options. We appreciate the opportunity to comment and hope by these comments to support the Regional Board's efforts to adopt an Agricultural Order that complies with the Water Code, the Nonpoint Source Policy, the Antidegradation Policy, achieves water quality objectives, and ensures that all people in the Central Coast enjoy their human right to clean, safe, affordable drinking water.

We are encouraged by the concepts contained within the tables with respect to groundwater nitrate loading. Under the Nonpoint Source Policy, the Regional Board is required to adopt regulatory tools that will achieve water quality objectives. Adopting a numeric standard for nutrient loading is one way to achieve WQOs. The choice to use a numeric standard is buttressed by the language of the Policy: "Where the RWQCB determines it is necessary to allow time to achieve water quality requirements the NPS control implementation program shall include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements."<sup>1</sup> In order to give meaning to the term "quantifiable milestones," there must be something to quantify. Adopting a numerical standard for loading and tying that standard to a series of quantifiable milestones clearly complies with the Nonpoint Source Policy.

Further, the Court of Appeal recently upheld the Sacramento Superior Court's order striking down Ag Order 2.0 as failing to comply with the Nonpoint Source Policy. (*Monterey Coastkeeper v. State Water Resources Control Board* (2018) 28 Cal.App.5th 342.) In so holding, the Court of Appeal held that "rewriting the NPS Policy to delay, diminish, or dilute a requirement that is part of the policy is improper." (*Id.* at 370.) The Regional Board is thus correct to look to the language of the Nonpoint Source Policy for directions and to mirror its requirements in Ag Order 4.0.

The approach outlined in the conceptual tables has the potential to comply with the Nonpoint Source Policy. We believe that there is a substantial body of evidence showing that in order to achieve and maintain water quality targets, any agricultural order must limit nitrogen application to rates where the vast majority of nitrogen is taken up by the crop. We believe that a numeric

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<sup>1</sup> State Water Resources Control Board, Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (2004), at p. 13.

limitation on nitrogen application, combined with a suite of management practices, can halt the decline in the Central Coast's groundwater quality and begin to allow for restoration. And we believe compliance with such a numeric limit is compatible with continued viable and healthy agricultural business in the Central Coast.

We also believe that a numeric standard must be, and Key Element 5 of the Nonpoint Source Policy requires it to be, tied to consequences for growers who violate that standard. We are encouraged to see that the conceptual tables envision sanctioning violators by restricting their ability to apply fertilizers in the future. This is the type of consequence that has the potential to change growers' behavior. We applaud this move and urge the Central Coast Regional Board to keep this feature in the final Order.

Below, we give comments on each of the conceptual tables (with a particular focus on groundwater and access to clean water) and also take the opportunity respond to comments from the agricultural community.<sup>2</sup>

### **Table 1**

#### **Tiers and phasing**

The current tier structure under Ag Orders 2.0 and 3.0 is ineffective at requiring adequate implementation of best practices and reporting requirements to all dischargers so we are pleased the staff is planning on moving away from this structure.

Not including any prioritization or phasing is the simplest option to implement the Ag Order. It does not require staff to make determinations on the prioritization of areas, it is clearer for the regulated farms to know what is required of them when, and having all growers on the same timelines makes it easier for staff to manage tracking and enforcement. Phasing in of requirements across growers may be acceptable only if there are serious concerns about regional board staff capacity to implement and adequately enforce the new Ag Order requirements across all growers at the same time. If there is phasing, there must be clear timelines that are as short as practicable to ensuring all growers are subject to the new requirements.

We also strongly disagree with the agricultural stakeholder's proposal to compare nitrate application/removed calculations only within the same township. If there are only one or two growers of a type of crop within the township then there is little ability to compare and determine outliers. While we understand the Central Coast region has a wide variety of weather conditions, hydrogeological conditions, and groundwater quality that may all to some degree influence the nitrate applied and removed numbers, this only means that such information must be taken into consideration when comparing different fields of the same type of crop.

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<sup>2</sup> See Abby Taylor-Silva, Grower Shipper Association of Central California, et al., letter to Jean-Pierre Wolff, Chair, California Regional Water Quality Control Board, Central Coast Region (Nov. 5, 2018) (November 5 Letter); Abby Taylor-Silva, Grower Shipper Association of Central California, et al., letter to Jean-Pierre Wolff, Chair, California Regional Water Quality Control Board, Central Coast Region (Oct. 8, 2018) (October 8 Letter).

### Numeric Limits

Limits must be set so as to protect all beneficial uses and ensure receiving water is meeting water quality objectives. Where receiving water is not currently meeting water quality objectives it may be that limits need to be even lower to ensure eventual restoration of the receiving water quality. Furthermore, where ranches repeatedly fail to meet the discharge limits and the growers are resistant to implementing new practices to reduce their loading they must be prohibited from applying additional sources of nitrates.

The agricultural stakeholders hold that numeric limits are inappropriate for non-point source discharges, yet they provide no reasoning as to why this may be true.<sup>3</sup> Numeric limits are appropriate as they are the best means for determining if a discharger is exceeding safe levels of discharges. To use any other method is likely to result in exceedances of water quality objectives or further degradation of already contaminated water bodies.

Nor does the ESJ Order pose any obstacle to using numeric limits on the Central Coast as the agricultural community suggests.<sup>4</sup> While the Order does provide direction to the Central Valley board for moving towards a numeric groundwater loading target, it provides no limitation, explicit or implicit, on the Central Coast Board.<sup>5</sup> And the State Board's ESJ Order was based upon the administrative record available to it at the time, and was based upon conditions in the Central Valley, which are quite different from the Central Coast.<sup>6</sup> We presume that, in developing Ag Order 4.0, the Central Coast Regional Board will develop and rely upon a substantial body of evidence showing the feasibility of the numeric limits it intends to adopt. The fact that the Central Valley Board chose not to develop this body evidence should not act as a barrier to this Board.

### Time Schedule to Meet Numeric Limits

Time schedules must be in compliance with the *Coastkeeper* case which was decided after the adoption of the ESJ Order. We are encouraged that the conceptual tables tie implementation of the numeric limit to a time schedule. This approach is potentially compliant with both *Coastkeeper* and the Nonpoint Source Policy.

### Monitoring and Reporting

#### *INMP*

We reiterate our comments above regarding phasing.

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<sup>3</sup> See November 5 Letter at 4-5.

<sup>4</sup> *Ibid.*

<sup>5</sup> ESJ Order at 73-74.

<sup>6</sup> We also note that the State Board's determination to not include a binding numeric standard in the ESJ Order is the subject of ongoing litigation in Sacramento Superior Court. It is reasonable and appropriate for the Regional Board to begin developing a numerical standard now in the event that the court requires the State Board to revise the ESJ order. Ongoing litigation also challenges the ESJ Order's failure to comply with the Antidegradation Policy and its failure to comply with Key Element 4 of the Nonpoint Source Policy because it improperly allows grower coalitions to keep key data secret.

The agricultural stakeholders' claim that reporting of total nitrogen applied by ranch is consistent with the ESJ Order is inaccurate. The ESJ Order clearly states that INMPs must be developed on a field-level basis, not farm-level: "All Members must prepare and implement an Irrigation and Nitrogen Management Plan (INMP) for each field and submit the INMP Summary Report for the previous crop year..."<sup>7</sup>

We have concerns that combining contiguous ranches into one reporting unit would violate the ESJ Order's requirement that reporting be done at the field level. The ESJ Order does allow the inclusion of multiple *fields* within one reporting unit, but does not allow separate *ranches* to do the same: "Where this Order requires reporting by field, Members may report data for a portion of a field or for multiple fields provided that the reported area has (1) the same crop type, (2) the same fertilizer inputs, (3) the same irrigation management, and (4) the same management practices. In no case should a reported area exceed a total size of 640 acres, and different crop types must always be reported separately even if they are within the same reporting area."<sup>8</sup> To resolve this ambiguity, we ask staff to clearly define what qualifies as a ranch and a field. It is not always clear what different operations within the Central Coast are defined as, and taking into consideration the complex nature of how farming operations work within the region, clear and transparent data is especially vital.

We disagree with the grower's assertion that growers who use high nitrogen irrigation water will be penalized. While nitrates within irrigation water are a part of the AR calculations and that AR calculations are primarily what determines an outlier, the ESJ order provides flexibility in the determination of what an outlier is. First, if the only nitrates being applied to the crops is from irrigation water then they cannot be considered an outlier.<sup>9</sup> Second, the ESJ Order tasks the Regional Water Boards to work on an approach to determine outliers, and that the approach may differ from crop to crop or even year to year.<sup>10</sup> Thus, a more relevant ask would be for the Central Coast Board to consider the existing water quality and the ability of a grower to use the nitrates in their irrigation water - in whole or in part - when determining the method for establishing outliers. Even better, the Regional Board should exercise that flexibility to stick with its current approach of defining a numeric limit and identifying growers who violate that limit, rather than using the "outlier" approach.<sup>11</sup>

We also urge the Regional Board to stand by its commitment in its Human Right to Water Resolution to "minimize impediments to data access and ...maximize the availability and accessibility of data and information regarding drinking water quality."<sup>12</sup> We urge the Regional

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<sup>7</sup> Waste Discharge Requirements General Order R5-2012-0116-R4, p 29.

<sup>8</sup> *Id.* at fn 27.

<sup>9</sup> State Water Resources Control Board Order WQ 2018-0002, p 52.

<sup>10</sup> *Id.*

<sup>11</sup> The "outlier" approach suffers from the issue that it is likely that the average grower is applying far too much nitrogen. Thus identifying only outliers can leave the bulk of the problem unaddressed. A numeric standard, by contrast is objective. It is also easier to understand and apply..

<sup>12</sup> Resolution R3-2017-0004, at p. 4.

Board to provide full public access to all data collected through monitoring and reporting programs to the maximum extent provided by law.

#### *Individual Discharge to Groundwater*

All ranches need to perform individual groundwater discharge monitoring regardless of whether they are meeting or exceeding the numeric discharge limit. Without this data it can be difficult to evaluate whether practices are effective at preventing contamination of the groundwater.

#### *Drinking Water Supply Well*

Testing for nitrate contamination for on-farm domestic wells is a vital component in ensuring people are aware of what is in their water. We applaud the Regional Board for having already implemented this program in the previous Ag Order. We would like to see the program take a few steps further to better protect vulnerable populations. First: the Regional Board should require testing of additional contaminants, in particular known contaminants in a particular area. While testing for nitrate is important, even if the water is free from nitrate, it does not necessarily mean the water is in fact safe to drink as it may contain a host of additional harmful contaminants like arsenic, 1,2,3-TCP, or hexavalent chromium. The State Water Board's East San Joaquin Order states it is within the regional water boards' authority to require more extensive testing. Second: when a well result comes back in violation of the nitrate MCL, if there are nearby domestic well or state small water system communities, these communities need to be notified that a exceedance was detected nearby and that they should look into well testing.

We also urge the Regional Board to require testing at a frequency that will capture contamination at the most vulnerable times of year. This means testing at a minimum of twice per year. It is well-known that water quality in groundwater, especially shallow groundwater, fluctuates throughout the year. Testing must be capable of determining whether wells comply with WQOs at all times, not just at the times of year when water is the cleanest.

We also urge the Regional Board to require growers to provide replacement water for contaminated domestic wells and to track provision of that water. Requiring replacement water is well within the Board's cleanup and abatement authority (Water Code section 13304.) And should the Regional Board proceed via a waiver pursuant to Water Code section 13269, such waivers may include "conditions." There is no limitation on what such condition could contain. Including a "condition" of requiring replacement water would comply with section 13269. Likewise, section 13263 permits a Regional Board to implement waste discharge requirements. Nothing in section 13263 prohibits a Regional Board from including replacement water as such a requirement. And there must be a requirement that any provided replacement water be of sufficient quantity and quality for cooking and drinking uses.

#### *Groundwater Quality Trends*

Requiring actual measurements rather than estimates allows for better tracking of groundwater quality trends. Estimates can only go so far, and in a region plagued by nitrate contamination, we need all the tools we can obtain.

### Incentives

We support the use of pump and fertilize as an incentive for growers to implement practices which do not add additional nitrates to the system.

We would also consider supporting a sustainability certification program. Under such a program, if a grower could demonstrate that it significantly exceeded the permit's requirements in a way that it actively contributed to water quality restoration, it could earn a certification from either the Regional Board or an outside organization. A grower could then market this certification to buyers. Obviously, any such system would need careful evaluation to ensure that it incentivizes the right behavior. But properly employed, it could encourage growers to not just meet the permit's requirements, but exceed them.

In sum, we believe that the concepts presented by the Regional Board have to the potential to both comply with the law and make a substantial and positive impact on water quality and access to clean drinking water. We look forward to working with the Regional Board as this process continues.

Thank you,



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